No. 83-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOLLY JENSEN, Director, and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Petitioners,

—vs.—

FRANCES J. QUARING,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

THOMAS C. LANSWORTH
811 South 13th Street
Lincoln, Nebraska 68508
(402) 475-0811
Counsel of Record

BURT NEUBORNE
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Respondent

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QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the State of Nebraska's refusal to grant Respondent's request for a religious exemption to the statutory requirement that drivers' licenses contain photographs of the licensee infringed upon the Respondent's First Amendment right to freely exercise her religious beliefs?

2. Was the court of appeals correct in holding that the State of Nebraska's interest in identification of licensed drivers may be adequately served in the circumstances presented by the Respondent's First Amendment claims by alternative measures less restrictive of the Respondent's right to freely exercise her religious beliefs?

3. Was the court of appeals correct in holding that requiring the State of Nebraska to make a reasonable accommodation of the Respondent's religious beliefs does not constitute an establishment of religion?

PARTIES

Petitioners Holly Jensen and William J. Edwards are the director and deputy director, respectively, of the Nebraska Department of Motor Vehicles. The department is the state agency responsible for the administration of Nebraska's motor vehicle operator's licensing program.

Respondent Frances J. Quaring is a resident of rural Shelton, Nebraska, qualified by age and testing results to receive a Nebraska driver's license.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited — Pages

Statutes Cited:

Other Authorities Cited

STATEMENT OF THE CASE

This case concerns the denial by the State of Nebraska and its officials of the Respondent's application for a valid Nebraska motor vehicle operator's license. Respondent Mrs. Frances J. Quaring was refused a driver's license because her religious beliefs do not allow her to submit herself to being photographed. Nebraska officials would not voluntarily grant Mrs. Quaring an exemption to the statutory requirement that a photograph of the licensee be affixed to most Nebraska drivers' licenses. See, Neb. Rev. Stat. §60-406.04 (Cum. Supp. 1982). This litigation then ensued pursuant to 28 U.S.C. §1343, and 42 U.S.C. §1983.

Frances J. Quaring is an adult, female resident of the State of Nebraska who lives with her husband and son on their family farm near Shelton, Nebraska. In addition to her

participation in the farming operation, Mrs. Quaring is also a part-time bookkeeper for a business in nearby Gibbon, Nebraska.

Mrs. Quaring had met every requirement for the issuance of a Nebraska motor vehicle operator's license, but the Petitioners refused to issue such a license to her because she refused to allow her photograph to be taken for use on the license as required by the Nebraska statute. The basis for Mrs. Quaring's objection to having herself photographed for any purpose is her sincerely-held religious belief in a literal interpretation of the Second Commandment. Mrs. Quaring made numerous attempts, through both legislative and administrative State officials, to obtain an exemption from the photograph requirement, but her request for an exemption was ultimately denied.

Mrs. Quaring's belief concerning the

Second Commandment results from her own self-study of the Bible in which she engaged after a family tragedy. Because of her exercise of this belief, she has no photographs of her only son, no television set, no decorations in her home reflecting nature or floral designs. Further, Mrs. Quaring removes labels from foodstuffs which she purchases for her family if those labels bear pictures of the contents of the package. She possesses no likeness of anything in creation.

Mrs. Quaring testified that she would consider it to be a violation of her religious beliefs if she allowed herself to be photographed. She stated that the circumstances surrounding her driver's license application placed her in a situation in which she was being forced to choose between her belief in the Second Commandment, on the

one hand, and being able to obtain the license, on the other hand.

At the time of the trial, Mrs. Quaring had been driving motor vehicles for 20 years. She had never received a traffic citation, or been charged with a law violation of any kind. During those 20 years, she had been requested to display her driver's license to a law enforement officer only once.

Mrs. Quaring's religious beliefs are Christian in nature and are based on the view that the Bible is the word of God which contains statements of God's will for her life. The Petitioners now concede that Mrs. Quaring's belief is religious in nature and is sincerely held.

The chief examiner for the driver's license division of the Nebraska Department of Motor Vehicles testified at trial that a driver's licensing program which included a

photograph exemption would require no change in the department's examination or application. The department files in the central office in Lincoln, Nebraska, do not contain copies or negatives of the photographs contained on licenses issued.

The associate director of the driver's services division of the Nebraska Department of Motor Vehicles testified at trial that there currently exist several types of licenses which are exempt from the photograph requirement, including school permits, limited special permits, learner's permits, and temporary permits. He further stated that it was the current practice for requests for any exemptions to licensing requirements to be reviewed and ruled upon in the central department office--not by the various county treasurers, who are the agents issuing the licenses. He stated that there had been only

one or two requests for photograph exemptions, including Mrs. Quaring's. He also stated that it would be possible to develop an administrative form, or an addendum to the current form, to address requests for photograph exemptions. The current driver's license form contains notations for the physical attributes or description of the licensee.

The superintendent of the Nebraska State patrol testified as to the identification purposes served the driver's license photograph. He also testified that there are a large number of drivers on Nebraska's highways who do not have photographic licenses because of the various exemptions noted above.

The district court found that the Petitioners had established two compelling interests in the photographic driver's license---identification served the interest

of public safety and the interest of security of financial transactions. However, the district court also found that, with respect to Mrs. Quaring's claim of interference with the free exercise of her religious beliefs, the photographic license is not the least restrictive alternative available to the Petitioners to serve these interests. The district court enjoined the Petitioners from refusing to grant Mrs. Quaring a non-photographic license.

The court of appeals affirmed the judgment rendered by the district court. Both the district court and the court of appeals rejected Petitioners' argument that granting the exemption requested by Mrs. Quaring would contravene the Establishment Clause.

REASONS WHY THE WRIT SHOULD BE DENIED

None of the considerations enumerated in this Court's Rule 17 are present in this case so as to compel the Court to grant the writ of certiorari sought by the Petitioners.

A. Conflicts Among the Lower Courts

The eighth circuit court of appeals' carefully considered decision presents no conflicts with the holdings of any other federal court of appeals. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), is the only decision by a federal court of appeals to have considered the Free Exercise Clause issues raised by the Petitioners' initial refusal to grant Mrs. Quaring a non-photographic driver's license. The court of appeals' opinion is consistent with the decisions of this Court and is firmly anchored in the settled doctrine established by those decisions. Reversal would compel this Court to severly restrict the scope of its earlier

holdings in cases such as Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981). The statements of this Court in those decisions in no way indicate an intention to confine their holdings to the limited factual context of denial of unemployment compensation benefits which both cases presented. Rather, in both Sherbert and Thomas this Court spoke of government privileges and benefits generally and declared firmly that religious liberty may not be impaired by governmental denial of such privileges based solely upon religious disqualifications. Sherbert, 374 U.S. at 404.

It is true that the court of appeals' decision appears to be in conflict with one decision of a state court of last resort. See, Johnson v. Motor Vehicle Division, 197

Colo. 455, 593 P.2d 1363, cert. denied, 444 U.S. 885 (1979). However, there are at least two factors which argue against granting a writ of certiorari in the instant case on the basis of its conflict in result from that reached in Johnson. First, Johnson, is distinguishable on its facts from the instant case. The Colorado licensing statute questioned in Johnson established an extensive state identification system complete with negative retrieval capabilities. By contrast, the Nebraska "system" simply requires the photograph on a driver's license and does not contemplate any wider identification scheme. Because of that difference, the quality of the state interests involved in these two respective cases is different and this apparent "conflict" in decisions is not significant enough to merit an exercise of this Court's discretion on

certiorari.

Second, the court of appeals' decision is completely consistent with that of another state court of last resort. In Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E. 2d 1225 (1978), the Indiana court returned a decision in which its holding on the Free Exercise Clause issue is virtually identical to that in the instant case. In addition to its consistency with the instant case, Bureau of Motor Vehicles is important to the considerations governing review on certiorari in the instant case because it is a decision which pre-dates Johnson. This Court denied certiorari in Johnson, then, fully aware that a conflict existed on the Free Exercise Clause issues presented in these cases between the courts of last resort in two different states. This Court did not view that

conflict as justification for granting the writ in Johnson, and a similar view should be taken here.

B. The Importance of This Case Is Limited to Its Parties

While this case is extremely important to Mrs. Quaring as she attempts to exercise her religious beliefs and still have access to the driving privileges available to every other Nebraskan who meets the age and driving requirements for a license, its importance really is limited to Mrs. Quaring and the Nebraska officials who would block her from receiving a license solely because she will not allow herself to be photographed. The court of appeals followed the precedents of this Court. The decision of the court below is not an extension of the Free Exercise Clause doctrine established by this Court. Rather, it is completely consistent with, and

compelled by, this Court's long line of decisions on this issue.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT MRS. QUARING'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE HER RELIGIOUS BELIEF IS BURDENED BY THE REQUIREMENT THAT SHE SUBMIT TO BEING PHOTOGRAPHED IN ORDER TO RECEIVE A DRIVER'S LICENSE.

Mrs. Quaring sincerely holds a deep religious belief in a literal interpretation of the Second Commandment which reads as follows:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

The Bible, Exodus 20:4, see also Deuteronomy 5:8. It is her sincerely-held religious belief that the proper interpretation of the Second Commandment precludes her from allowing herself to be photographed; since,

in her view, photographs are the modern-day equivalent of the graven images which the Commandment forbids.

Mrs. Quaring's beliefs about photographic images come into direct conflict with Nebraska motor vehicle operator's licensing statutes. The basis of the Petitioners' refusal to issue Mrs. Quaring a new driver's license is the requirement of Neb. Rev. Stat. §60-406.04 (Cum. Supp. 1982) that all such licenses must have affixed to them a color photograph of the licensee.

The two state court cases which have previously addressed the exact same issue presented here have both found that the driver's license photograph requirement infringes upon the First Amendment rights of those who believe, as Mrs. Quaring does, that the Second Commandment forbids the photographing of anything in God's creation.

See, Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363, 1364 (1979), cert. den., 444 U.S. 885 (1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E. 2d 1225, 1226-27 (1978). It is true that these two courts reached opposite results with regard to whether the licensing statute involved in each could withstand constitutional attack. However, both the Colorado court and the Indiana court agreed that the state in each instance was required to show that some compelling state interest was being served by the license photograph. Johnson, supra, 593 P.2d at 1364; Bureau of Motor Vehicles, supra, 380 N.E. 2d at 1227. Colorado held that the photograph requirement was justified by a compelling state interest in identification; Indiana did not, holding instead that any interest in identification can be satisfied

through some alternative means less restrictive of the First Amendment rights involved. It should be noted that the identification system established under the questioned Colorado statute was much more extensive than Nebraska's, with multiple state purposes served in Colorado by a negative retrieval system. See also, Dennis v. Charnes, 571 F.Supp. 462 (D. Colo. 1983), following Johnson.

The Petitioners, in their argument (Pet. 7, 10, 12, 14, 15), have attempted to characterize the harm to Mrs. Quaring as the loss or limitation of her driving privileges. Such an argument is either a misstatement or a misunderstanding of the law governing this case.

The harm being suffered by Mrs. Quaring is not an infringement of her driving privileges. The Respondent cannot be more empha-

tic about this point. The argument to the contrary by the Petitioners ignores the statements of this Court that:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Sherbert v. Verner, 374 U.S. 398, 404 (1963). In fact, most of the leading cases on the Free Exercise Clause have involved the denial of some benefit or privilege because of religious disqualification, e.g., Sherbert, supra; Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).

In Cantwell v. Connecticut, 310 U.S. 296, (1940), this Court held that the First Amendment embraces the freedom to act as well as the freedom to believe. This decision marked the abandonment of the belief-action distinction that had characterized some of

the Court's earlier decisions. See, e.g., Reynolds v. United States, 98 U.S. 145 166 (1878). Cantwell represents a significant step toward greater protection for religious acts under the Free Exercise Clause. It is true that, under the proper circumstances, religious actions may be regulated or prohibited. But that may occur only where the governmental interests advanced are of compelling importance and where those interests cannot be served by some means less restrictive of religious freedom. This is not such a case.

In Sherbert v. Verner, supra, the balancing test was reaffirmed, but this Court altered it in a manner that has great significance to the analysis of Free Exercise Clause claims. In Sherbert, this Court shifted the presumption of validity to the religious practice or interest asserted, and

away from the state law or regulation.

Sherbert dealt with a South Carolina statute which predicated unemployment compensation on the availability for work when offered. Mrs. Sherbert, a member of the Seventh Day Adventist Church, was denied such benefits when she refused to take available Saturday work because of her religious convictions. Mr. Justice Brennan, writing for the majority, noted at 374 U.S. 398, 403, 407:

> "If therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' N. A. A. C. P. v. Button, 371 U.S. 415, 438, 9 LEd. 2d 405, 421."

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses endangering paramount interests, give occasion for permissible limitation.' Thomas v. Collins, 323 U.S. 526, 520, 89 L.Ed. 430, 440."

The balancing test which the Sherbert Court applied extended the protection of Free Exercise claims and shifted to the State the burden of proving endangered governmental interests of much greater extent than what had been previously required. In Sherbert, the statute was invalidated as to Mrs. Sherbert, although it posed merely an indirect burden on her religious liberty, since no religious action was specifically prohibited.

This Court reaffirmed and strengthened the Sherbert analysis in Wisconsin v. Yoder, 406 U.S. 204 (1972), when it struck down a

compulsory education law as applied to the Amish, who feared that a high school education would alienate their children from God. Mr. Chief Justice Burger, writing for the majority stated that the Amish rejection of worldly influences and outside contacts was religiously mandated and that their deep conviction to their unique lifestyle was, in fact, religious expression. In Yoder, this Court ultimately reasoned that although the state's interest in compulsory education was compelling, it was not so absolute as to justify infringement on the Amish way of life.

More recently, in United States v. Lee, 455 U.S. 252 (1982), this Court applied this same balancing test in considering another Free Exercise claim advanced by an adherent of the Old Order Amish faith and lifestyle. In Lee, the question was whether the Free

Exercise Clause required the government to grant an exemption to the requirement that employers withhold social security taxes from exmployees' wages , pay the employer's share of social security taxes, and file the required social security tax returns. The exemption had been sought on the basis that the social security system interfered with the Free Exercise rights of the Amish who object on religious grounds to the receipt of public insurance benefits.

In holding that the Free Exercise Clause does not compel the exemption from social security tax obligations sought by Lee, this Court adhered to the analytical approach and balancing test articulated in Sherbert, supra. Neither the analysis nor the result in Lee is in any way inconsistent with that reached by the court of appeals in the instant case. The result in Lee that accom-

modation of a belief which requires its adherents to refrain from paying certain taxes is not mandated by the Free Exercise Clause was reached because this Court concluded that the broad and compelling governmental interest in maintaining a sound tax system could not be achieved if exemptions from payment of taxes were granted on the basis of religious beliefs. The holding in Lee is reflective of this Court's historical approach to Free Exercise claims which threaten uniformity in the operation of tax systems, see, e.g., Follett v. Town of McCormick, 321 U.S. 573 (1944), or in the application of otherwise reasonable regulations to commercial activity, Braunfeld v. Brown, 366 U.S. 599 (1961).

The holding of the court below is consistent with that of Lee. The analysis of the issues presented in the court of appeals

is identical to that applied by this Court in Lee. The difference in result arises from the inquiry in each case concerning whether a religiously-based exemption to an otherwise uniform requirement would unduly interfere with the government's ability to achieve the interests and objectives of the program in question. In Lee, this Court concluded that such an exemption would threaten the viability of the tax system. 455 U.S. at 259-261. In the instant case, the eighth circuit court of appeals concluded that the interests served by photographic drivers's licenses would not be unduly threatened or thwarted by the exemption sought by Mrs. Quaring.

As noted above, the Petitioners' attempt to obscure the First Amendment claim of the Respondent by focussing on drivers' licenses as a privilege to which there is no fundamental right (Pet. 14, 15), misstates the issue

and such obfuscation must not be allowed to misdirect this Court's consideration of the petition. It is not an infringement of her driving privileges of which Mrs. Quaring complains. Rather, the harm being suffered by Mrs. Quaring is the infringement of her First Amendment right to freely exercise her religion. By requiring her to submit to being photographed before receiving a current driver's license, the Petitioners would require Mrs. Quaring to choose between following an important precept of her religion and forfeiting the important governmental privilege of driving a motor vehicle, on the one hand, and abandoning one of the precepts of her faith in order to obtain a driver's license, on the other hand. Forcing her to make such a choice is a violation of her First Amendment rights. Sherbert, supra, at 404; Thomas, supra at 717-18. Both the

district court and the court of appeals recognized this in their findings and holdings. Those findings and holdings are supported by both the law and the evidence in this particular case. They are correct and require no further review.

II. THE COURTS BELOW CORRECTLY FOUND THAT THE STATE'S COMPELLING INTERESTS IN REQUIRING PHOTOGRAPHIC DRIVER'S LICENSES COULD BE SERVED BY ALTERNATIVE MEANS LESS RESTRICTIVE OF MRS. QUARING'S RIGHT TO FREELY EXERCISE HER RELIGIOUS BELIEF.

The district court found that the driver's license photograph served two compelling state interests: (1) adequate regulation and identification of persons driving on Nebraska highways, and (2) furthering the security of financial transactions, (Pet.,App. 7-8). Although the Respondent would argue that there is serious legal question about whether such state interests

are compelling within the context of constitutional analysis, see, Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 125 (1978), and Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), Pet., App. 27-29, the fact is that, compelling or not, these interests can be served by means less restrictive than an absolute denial of any exemption to the photograph requirement. The Constitution requires an inquiry into whether the means employed to serve the government's interests represents the least restrictive alternative for achieving the desired end. Thomas v. Review Board, 450 U.S. at 718.

In the instant case, the record reflects that the administrative machinery already is in place for the procedures required by the accommodation granted to Mrs. Quaring's religious belief. There simply would be no

significant administrative burden created by the district court's decision requiring such accommodation. At most, the Department of Motor Vehicles may have to devise a form upon which persons desiring a photograph exemption could make application. The state central licensing office is already in daily contact with licensing stations, and procedural directives are issued from the central office to county treasurers on a regular basis. Following the entry of the district court's judgment, the Department of Motor Vehicles arranged for Buffalo County, Nebraska, officials to isue a non-photographic license to Mrs. Quaring. Only administrative inconvenience which renders an entire statutory scheme unworkable will be sufficient to prevent the implementation of a less restrictive alternative when such an alternative will not threaten the state interests underlying the

statute. Sherbert v. Verner, 374 U.S. at 409.

The Minnesota Supreme Court was presented with an analogous situation in In re Jenison, 265 Minn. 96, 120 N.W.2d 515, vacted and remanded, 375 U.S. 14, on remand, 267 Minn. 136, 125 N.W.2d 588 (1963). Jenison involved a claim of a religiously-based exemption from jury duty. In its first opinion, the Minnesota court held that such an exemption would present administrative difficulties of the same sort asserted by the Petitioners in the instant case. This Court vacated that decision and remanded the case for further consideration in light of Sherbert, supra. On remand, the Minnesota court, properly following the analysis articulated in Sherbert, held that there had been an inadequate showing by the State that the requested exemption would result in an inabi-

lity to obtain competent jurors. The court said:

> Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt.

Jenison, supra, 125 N.W. 2d at 589. It is likewise clear from the record in the instant case--as the court of appeals correctly decided--that the exemption sought by Mrs. Quaring will not create an administrative burden which will render Nebraska's drivers' licensing program unworkable.

In addition to the absence of any administrative burden created by the accommodation of Mrs. Quaring's belief, such accommodation presents no significant threat to the State's ability to serve its compelling interests. The minimal number of people, in addition to Mrs. Quaring, who may

request such an exemption, will not have any significant impact on the identification system. Indeed, the few persons who may seek such an exemption would represent a minuscule percentage of the large pool of drivers on Nebraska highways who are already driving with the various types of permits which are statutorily exempt from the photograph requirement.

With regard to the other state interest found by the lower courts, there has been no showing whatever that Mrs. Quaring represents any threat to the security of financial transactions. Concerning check cashing and other such financial transactions, if anyone is inconvenienced or handicapped by the accommodation granted below, it is the person issued a non-photographic license. Merchants are free to demand whatever identification they deem appropriate and sufficient when their

customers seek to cash checks. If merchants demand photographic identification documents, it is the person without the photograph who is at a disadvantage--not the merchant, and certainly not the State since, if the transaction does not take place, the State has no interest at all.

III. NO VIOLATION OF THE ESTABLISHMENT CLAUSE OCCURS IF NEBRASKA OFFICIALS ARE REQUIRED TO GRANT MRS. QUARING AN EXEMPTION FROM THE PHOTOGRAPH REQUIREMENT OR IF THOSE OFFICIALS ARE REQUIRED TO ESTABLISH CRITERIA ON WHICH TO BASE GRANTS OR DENIALS OF EXEMPTIONS TO THE PHOTOGRAPH REQUIREMENT.

The Petitioners argue that the photograph exemption granted Mrs. Quaring by the courts below violates the Establishment Clause. The court of appeals was correct in holding that such accommodation of religion in this case does not constitute establishment of religion.

In order to withstand challenges arising

under the Establishment Clause, a governmental practice must (1) have a secular legislative purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The exemption granted Mrs. Quaring is consistent with either the Lemon test or with the "contextual" analysis employed by this Court in Lynch v. Donnelly, __U.S.__, 104 S.Ct. 1355 (1984).

The exemption here has the secular purpose of securing Mrs. Quaring's free exercise of religious rights; its primary effect in no way advances her religion since it arises in the first place because of a religious disqualification imposed by the government and merely restores her to a status equal to other citizens; it does not foster governmen-

tal entanglement with Mrs. Quaring's belief.

If viewed from the perspective of the context in which the Free Exercise Clause claim arises, it also is clear that an accommodation of the belief at issue here does not establish a governmental preference for Mrs. Quaring's belief. There is neither participation by the government in Mrs. Quaring's belief, nor is there a governmental endorsement of the belief under the judgments of the lower courts. By granting Mrs. Quaring a non-photographic driver's license, the government is merely recognizing the validity of her assertion that her personal attempts to live a life consistent with her beliefs are shielded from governmental interference--direct or indirect--by the Free Exercise Clause. See, also, Marsh v. Chambers, --U.S.--, 103 S.Ct. 3330 (1983).

CONCLUSION

For all of the foregoing reasons,

certiorari should be denied.

Respectfully submitted,

THOMAS C. LANSWORTH
Counsel of Record
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811

BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Respondent

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